IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5926 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHIKHA PANCHA AHER

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 5926 of 2002

MR VIJAY H PATEL for Petitioner No. 1

Mr.R.C. Kodekar, ASSISTANT GOVERNMENT PLEADER for Respondent No. 1-3

RULE SERVED BY DS for Respondent No. 1

CORAM : MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 04/12/2002

ORAL JUDGEMENT

The present petition is filed by the petitioner challenging the order of detention dated 10.12.2001 passed by the District Magistrate, Jamnagar, Annexure 'A' to the petition. The order under challenge is passed by the District Magistrate with a view to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order in exercise of powers conferred by subsection (1) of section 3 of the Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as "the Act"). The grounds of detention dated 10.12.2001 are produced at Annexure 'C' to the petition. The case of the petitioner is that he is falsely implicated in the offence by the Police. The petitioner has not committed any offence and hence there was no reason for passing the order of detention, more particularly on the basis of the complaints and statements against which the detenu could not make an effective representation whereby his right to make effective representation guaranteed under Article 22(5) of the Constitution of India is violated.

2. Mr.Patel, the learned advocate appearing for the petitioner submitted that the subjective satisfaction of the detaining authority is vitiated on the ground that the detaining authority has taken into consideration as is mentioned in ground no.4, a fact to the effect that the land in question was sold by the petitioners to one Shri Devshi Alabhai Poshtaria keeping back from him the fact that the petitioner has no legal right of ownership and by creating an impression that the land is of independent possession, occupation and ownership of the petitioner detenu and that he executed a Power of Attorney on stamp paper of Rs.70/-, dated 2.11.2001 for a huge consideration, giving rights including that of sale. The detaining authority has referred to pages 23 to 27. Mr.Patel submitted that there are other points on which the order of detention is vitiated but first he will like to demonstrate that subjective satisfaction recorded by the detaining authority is vitiated inasmuch as in the document referred to, i.e. Power of Attorney dated 2.11.2001, a copy of which is produced at pages 23 to 27 along with the grounds of detention, it is stated that the petitioner has executed Power of Attorney in favour of Shri Devshi Alabhai Poshtaria for giving powers mentioned therein. In para 2 of the Power of Attorney it is stated that this land is given to run a hotel, to

manage and to effect sale and purchase for the purpose, for engaging persons, for employing servants and for doing all relevant activities to manage this deed executed. In para 4 it is mentioned that for the regularisation of the land of the hotel, to make payment of necessary consideration, fees, taxes, the power is given. In para 7, it is mentioned that power is given to make application or submit report to the Government, Semi-Government or local self Government institutions, to deposit the amount and to withdraw the same. The learned advocate submitted that a bare reading of Power of Attorney will show that the person in whose favour it is executed, namely, Shri Devsi Ala Aher was made aware of the nature of possession and occupation of the petitioner detenu. He submitted that his contentions are further substantiated from the document, which is titled as, "sale of construction". It is a document executed on a stamp paper of Rs.50/-, on 2.11.2001 at page 15 of the compilation. The Power of Attorney is also executed on the same day. In that document it is specifically mentioned that, "I, the person (seller) executing the deed, is giving this writing to the person who is getting that writing executed (purchaser) that the Govt. land admeasuring 1000 sq. meters, bearing Survey No.574 of Village Dhunvav, Taluka Jamnagar is having NA assessment of 0.4 paise wherein a hotel and restaurant in the name of 'Radhekrishna' is situated. Said hotel with a running business, with superstructure is sold to the purchaser for a sum of Rs.1,25,000/-. Mr.Patel submitted that as the said document is supplied by the detaining authority along with the grounds of detention at page 15 the detaining authority was very much aware that the petitioner did not misrepresent to said Shri Devshi Alabhai Poshtaria about the real facts of the land in question. In fact it was mentioned in the aforesaid document in so many words that the land in question admeasuring 1000 sq. meters is Government land bearing Survey No.574 having NA assessment of 0.4 paise. Despite the specific contents of the document, the detaining authority has recorded his satisfaction as mentioned in the grounds at serial no.4 that the land was sold to Shri Devshi Alabhai Poshtaria by keeping him ignorant about the rights of the petitioner on the land in question. (emphasis supplied)

3. Mr.Patel submitted that this is a case wherein the detaining authority for extraneous reasons has recorded his subjective satisfaction about the sufficiency of grounds for issuing the order of detention, hence subjective satisfaction of the authority is vitiated and the order of detention is required to be

quashed and set aside and the petitioner is required to be set at liberty forthwith.

4. Mr.R.C. Kodekar, the learned Assistant Govt. Pleader submitted that an affidavit in reply is filed on behalf of Shri R.K. Pathak, Ex District Magistrate, Jamnagar who had passed an order of detention. He submitted that as stated in para 9 of the affidavit in reply, the order of detention was approved by the State of Gujarat on 18.12.2001 within the stipulated time as contemplated in law. He submitted that as mentioned in para 11 of the affidavit in reply, in the opinion of the detaining authority the activities of the petitioner were falling within the definition of the term, 'property grabber' defined in clause (h) of sec.2 read with subec.(4) of sec. 3 of the Act and looking to the activities of the detenu, it was felt necessary to detain the petitioner detenu as the same were prejudicial to the 'maintenance of public order'. Mr.Kodekar submitted that subclause (h) of sec.2 of the Act reads as under:

> (h) "property grabber" means a person who illegally takes possession of any lands not belonging to himself but belonging to Government, local authority or any other person or enters into or creates illegal tenancies or lease and licence agreements or any other agreements in respect of such lands or who constructs unauthorised structures thereon for sale or hire or gives such lands to any person on rental or lease and licence basis for construction or use and occupation of unauthorised structures or who knowingly gives financial aid to any person for taking illegal possession of such lands or for construction of unauthorised structures thereon or who collects or attempts to collect from any occupiers of such lands rent, compensation or other charges by criminal intimidation or who evicts or attempts to evict any such occupiers by force without resorting to the lawful procedure or who abets in any manner the doing of any of the above mentioned things;"

4.1 He relied upon the contents of para 12 of the affidavit in reply in this regard wherein it is stated that,

> " .. .. I say that the detenu is detained on the ground that is a property grabber and the detenu has unauthorisedly constructed the property on the Sarkar Kharaba No.574, situated

in Village Dhunvav of Jamnagar District. The said govt. land admeasuring 1000 sq. mtr. came to be grabbed by the detenu and obtain possession unauthorisedly. The detenu also unauthorisedly constructed construction on the said land and he sold that construction on consideration and when the notice was given and the Mamlatdar under sec.202 of the Bombay Land Revenue Code initiated steps. The detenu sold the said constructed property on consideration of Rs.125000. Hence there is sufficient material on record to arrive at the conclusion that the detenu is a property grabber and he unauthorisedly constructed construction on the Govt. land. The detenu comes within the purview of property grabber as defined under sec.2(h) of the PASA Act and hence the subjective satisfaction arrived at by the detaining authority by considering the credible material before him is justified in passing the order of detention."

4.2 The contentions raised by Mr.Patel that subjective satisfaction of the detaining authority is vitiated as the authority has not taken care to appreciate the contents of the document as page 15 warrants consideration because in para 4 of the grounds of detention, the detaining authority recorded a conclusion that the land is sold by the petitioner detenu to Shri Devshi Alabhai Poshtaria keeping him ignorant about the nature of his ownership to the land in question and by creating an impression that he is having independent possession and occupation of the ownership rights on the land in question, are not supported by the documents on record of the case.

4.3 This Court is conscious of the fact that 'sufficiency of material' is not open for judicial scrutiny, but at the same time the detaining authority cannot misread or overlook the contents of a document on which it relied for passing an order of detention. From the contents of the document at page 15 and the conclusion recorded based on that document the inevitable inference is that the subjective satisfaction arrived at by the detaining authority for passing the order of detention is vitiated and therefore, the order of detention is required to be quashed and set aside.

5. At the time of admission hearing of the matter, this Court (Coram : C.K. Buch, J.) passed an order dated 29.6.2002 as under:

"Notice returnable on 8.7.2002. Mr.AY Kogje learned AGP waives service of notice on behalf of respondent no.3. Mr.Kogje learned AGP is directed to get instructions as to whether the erected portion on the land referred by the petitioner is removed by the Government machinery or not."

6. From the record it appears that on the returnable date, the learned AGP did not file any reply, despite the direction given by this Court to get instructions as to whether the erected portion on the land referred by the petitioner is removed or not. The Court passed the following order on 9.7.2002:

"Rule. Learned AGP Mr.AY Kogje is directed to waive service of notice of rule on behalf of respondent no.3. The Registry is directed to list this matter for final hearing in seriatum considering the date of detention order. Direct service is permitted for the rest of the respondent."

The matter appeared on Board on 14.10.2002 and the Court (R.P. Dholakia, J.) passed the following order:

"Learned AGP, Mr.I.M. Pandya is directed to see that some responsible person from the District shall remain present in the Court on the next date, i.e. on 21.10.2002."

On 21.10.2002 the Court passed the following order:

"Mr.Vijay H. Patel, learned counsel for the petitioner is not present but Mr.Sharma, learned counsel on behalf of Mr.Vijay H. Patel is present. Learned Govt. Pleader is present. The officer from the office of the District Magistrate is also present.

On instructions received from the concerned officer of the District Magistrate who is present in the court, Mr.AD Oza, learned Govt. Pleader has made a statement at bar that the District Magistrate has initiated actions against the detenu for taking possession of the land grabbed by the detenu, back.

The District Magistrate is hereby directed to file affidavit before this Court on or before the next date stating that what action he has taken

against the detenu for taking the land back and what action he wants to take against the detenu.

S.O. to 29.10.2002.

Copy of this order be supplied to learned AGP Mr.I.M. Pandya for forwarding the same to the concerned District Magistrate for information and necessary action in the matter."

6.1 Despite this order, the District Magistrate did not file an affidavit and therefore, on 25.11.2002 this Court has passed an order, para 2 of which reads as under:

"Till date, no affidavit is filed by the District Magistrate. The office is directed to issue Notice to show cause as to why appropriate action should not be taken against the District Magistrate for non compliance of the order of this Court. The District Magistrate shall file his reply latest by 2nd December 2002, failing which coercive steps will be required to be taken."

6.2 After passing of the above order dated 25.11.2002, two affidavits are filed, one by R.K. Pathak, Ex District Magistrate, Jamnagar which is referred to hereinabove at length and the other by Arunkumar M. Solanki, District Magistrate, Jamnagar explaining the circumstances in which delay was caused in filing the affidavit. The explanation rendered is as under:

"Regarding the delay in filing the affidavit as per the Hon. Court's order, I would humbly like to submit that respondent officer from the office of Mamlatdar was asked to remain present on 21.10.2002 at the time of hearing in the court. Deputy Mamlatdar (Revenue) had reported that he was not aware of any order passed in the Hon. Court and no instruction was given to him by the Govt. Pleader at that time regarding issuance of such order by the Hon. Court. This understanding of Dy. (Mamlatdar) was not correct.

On 29.10.2002 during the hearing in Hon. Court Dy. Mamlatdar (Rev.) and Mamlatdar (Rural), Jamnagar both had remained present. It has been reported to me that they were not aware of the

Court's order and Govt. Pleader had also not informed them that affidavit is to be filed."

6.3 The explanation rendered by the District Magistrate is not at all satisfactory. Even if it was so, the District Magistrate was required to take action against the Deputy Mamlatdar (Revenue) who had remained present before this Court on 21.10.2002, the day on which the Court passed order directing the District Magistrate to file an affidavit. The Government officers attend the Court causing expenditure to the public exchequer. They are expected to discharge their duties sincerely. A responsible officer of the rank of Deputy Mamlatdar not reporting to the District Magistrate about the order passed by the Court, is serious and the District Magistrate ought to have taken action against him. Shirking responsibility by saying that the Govt. Pleader did not give any instructions to the Deputy Mamlatdar is not good taste and is not expected from the District Magistrate. Deputy Mamlatdar is a responsible officer and when he attends the Court as part of his duty, he is paid TA/ DA for the purpose causing avoidable burden on the public exchequer. To plead that the Deputy Mamlatdar did not understand the language of the Court and therefore, did not know the order passed by the Court and that the Govt. Pleader did not intimate the order passed by the Court, is nothing but an excuse which is not worth accepting and hence not accepted.

6.4 The District Magistrate is hereby directed to take appropriate action against the concerned Deputy Mamlatdar who attended this Court on 21.10.2002 and did not report about the order passed by the Court to the District Magistrate and report to this Court the action taken against the concerned officer within six weeks from the date of receipt of this order.

7. In the matter between Kamla Kanhaiyalal Khushalani v. State of Maharashtra, reported in A.I.R. 1981 SC 814, the Honourable Apex Court had an occasion to observe as under:

"8. It is a matter of great concern and deep dismay that 8. It is a matter of great concern and deep dismay that despite repeated warnings by this Court, the detaining authorities do not care to comply with the spirit and tenor of the constitutional safeguards contained in Art. 22(5) of the Constitution. It is manifest that when the detaining authority applies its mind to the documents and materials which form the basis

> of the detention, the same are indeed placed before it and there could be no difficulty in getting photostat copies of the documents and materials, referred to in the order of detention, prepared and attaching the same along with the grounds of detention, if the detaining authority is really serious in passing a valid order of detention. Unfortunately, the constitutional safeguards are not complied with, resulting in the orders of detention being set aside by the Court, even though on merits they might have been justified in suitable cases. We feel that it is high time that the Government should impress on the detaining authority the desirability of complying with the constitutional safeguards as adumbrated by the principles laid down in this regard. We would like to suggest that whenever a detention is struck down by the High Court or the Supreme Court, the detaining authority or the officers concerned who are associated with the preparation of the grounds of detention, must be held personally responsible and action should be taken against them for not complying with the constitutional requirements and safeguards (viz. delay in disposing of the representation, not supplying the documents and materials relied upon in the order of detention pari passu the order of detention, etc. etc.) or, at any rate, an explanation from the authorities concerned must be called for by the Central Government so that in future persons against whom serious acts of smuggling are alleged, do not go scot free. In the instant case, not only were the documents and materials not supplied along with the order of detention, but there has been a delay of about 25 days in disposing of the representation of the detenu and no explanation for the same has been given. These are matters which must be closely examined by the Government. (emphasis supplied)

8. In the present case the detaining authority recorded its subjective satisfaction on the basis of the material supplied along with the grounds of detention. The two documents referred to in grounds no.2 & 4 that the subjective satisfaction recorded by the detaining authority in ground 4 is dehors the contents of the aforesaid two documents. In light of that the observations of the Honourable the Supreme Court are applicable to the facts of the present case, hence a copy of this order is ordered to be placed before the Chief Secretary, Gujarat State who shall consider to take

appropriate action as suggested by the Honourable the Apex Court. The Chief Secretary shall report the action taken in this matter. Report shall be submitted to this Court within three months from the date of receipt of this order.

9. In the result, this petition is allowed. The impugned order of detention dated 10th December 2001 is quashed and set aside. The detenu Bhikha Pancha Aher is ordered to be set at liberty forthwith, if is not required in any other case. Rule is made absolute accordingly with no order as to costs. Direct service is permitted.

(Ravi R. Tripathi, J.)

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